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In the Supreme Court of the United States

OCTOBER TERM, 1959

PAUL DELUCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 163–173) is reported at 262 F. 2d 610.

JURISDICTION

The judgment of the Court of Appeals was entered on December 31, 1958 (Pet. 163), and a petition for rehearing was denied on February 5, 1959. The petition for a writ of certiorari was filed on March 3, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether the District Court erred in the admission of evidence, not objected to by the petitioner, consisting of (*a*) an expert accountant's opinion as to the maximum amount of cash petitioner might have had on hand as of December 31, 1947; and (*b*) the reports of two Treasury agents setting out the results of their investigation into petitioner's tax liability for earlier years.

3. Whether there is a fatal inconsistency between the Court of Appeals' reversal of the convictions on Counts I and II (relating to petitioner's income taxes for 1948 and 1949) and its affirmance of the conviction on Count III (relating to his 1950 income taxes).

4. Whether, after a Government witness had testified only to an admission made to him by petitioner in 1956, the District Court erred in refusing to require the production, for the use of defense counsel in cross-examination, of copies of reports the witness had made to the Government prior to 1956.

5. Whether petitioner's acquittal on Count IV (a conspiracy count) requires reversal of his conviction on Count III (a substantive count).

6. Whether the District Court erred in giving the jury a supplemental instruction.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this

chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145(b)).

STATEMENT

On March 4, 1957, petitioner was indicted in the United States District Court for the Northern District of Illinois, Eastern Division, on three counts for wilful attempted evasion of his individual income taxes for the years 1948 through 1950, in violation of Section 145(b) of the Internal Revenue Code of 1939. The indictment alleged that petitioner and his wife had received unreported income during those years, resulting in tax deficiencies as follows (AA. 2–5):[1]

Year	*Unreported tax liability*
1948	$75,201.14
1949	17,589.54
1950	35,555.88
Total	$128,346.56

[1] The appellant's appendix in the Court of Appeals, consisting of three volumes with pages numbered 1 to 683, is designated "AA." The Government's appendix in the Court of Appeals, consisting of one volume with pages numbered 1 to 461, is designated "GA."

The indictment also contained a fourth count, in which petitioner and one Bulger were charged with conspiring to make false and fraudulent statements in a matter within the jurisdiction of the United States Treasury Department, in violation of 18 U.S.C., Section 371 (AA. 6–7).

After a jury trial, petitioner was found guilty on the first three counts. Both defendants were acquitted on the conspiracy count (AA. 642). Petitioner was fined $5,000 on each of the counts on which he was convicted, and given three consecutive three-year prison terms (AA. 668). For reasons discussed hereinafter (*infra*, p. 14 and fn. 7), the Court of Appeals reversed petitioner's conviction on the first two counts and affirmed as to Count III. (Pet. 163–173; *United States* v. *DeLucia*, 262 F. 2d 610.)

The evidence to support the verdict may be summarized as follows:

On the 1950 individual income tax return of petitioner there was reported a net loss of $9,838.82, resulting mainly from the operation of his farm (AA. 101–106). The Government's evidence showed that, on the basis of petitioner's receipts and expenditures,[2] his true 1950 income was $61,915.14, on which he owed a tax of $23,754.84 (AA. 528, 540; GA. 461). The great majority of the expenditures were stipulated (*e.g.*, AA. 27–38, 106–114, 276–280), and the others were uncontroverted. The principal issue at the trial was the accuracy of the computation by

[2] On his own books petitioner always computed his income by the expenditures method (AA. 168–169, 183–185).

which the Government had fixed petitioner's maximum undeposited cash on hand as of December 31, 1947, at $48,697.01 (GA. 449).

The Treasury agents made a thorough search of gift tax returns and estate tax returns in the family names of petitioner and his wife, in a quest for evidence of the receipt of non-income funds, but with negative results (AA. 325; GA. 185).

Petitioner entered the United States in 1920, when he was 22 or 23 years old (AA. 88).[3] Petitioner filed no income tax returns for the years 1920 through 1933 (AA. 106–107, 326; GA. 184–185). He did file income tax returns for the years 1934 through 1947, except that he filed no return for the year 1944 (AA. 89). The total income reported by petitioner from 1934 through 1947 was $509,816.58 (AA. 107–113, 326, 377; GA. 449). He had also received certain non-income funds and substantial unreported income during many of those years, as disclosed by previous examinations by Treasury agents. The total of these additional funds was $293,479.80, which comprised (1) $227,781.46 of unreported income received by petitioner during the years 1935 through 1940 as his share of monies extorted from producers and distributors of motion pictures (AA. 116–126; GA. 11, 20–22, 449);[4] and (2) $65,698.34 of other funds re-

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[3] This Court has already had occasion at the present term to deny a petition for certiorari filed by this petitioner in connection with a denaturalization proceeding against him. *Paul DeLucia* v. *United States*, 358 U.S. 836.

[4] Petitioner was given credit for the entire $227,781.46, despite the fact that he had five times denied under oath that he had ever received any extortion money (AA. 443–447, 492,

ceived by petitioner over the years, some of it resulting from technical adjustments to his reported income and the remainder consisting of non-income receipts of funds, such as loans and returns of capital (AA. 353, 354–356; GA. 449). The Government, by adding petitioner's reported income, unreported income, and non-income funds, arrived at a total of $803,296.38 of gross funds available to petitioner over the 14-year period (AA. 357; GA. 449). The grand total of petitioner's proved expenditures over the same period was $757,875.47, which, when subtracted from the gross funds available (after a minor adjustment),[5] resulted in a difference of $48,697.01, which reflected the maximum possible cash petitioner could have had on hand at the beginning of the prosecution years, December 31, 1947 (AA. 357–358; GA. 449).

The Government then proceeded to establish that on the basis of his proved expenditures petitioner had

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498; GA. 29–32, 265, 269) and despite the fact that petitioner had settled the Government's tax claims for those years by paying tax on only half of the $27,781.46 (AA. 127, 160, 154).

In 1944, petitioner and six others were convicted in the United States District Court for the Southern District of New York of conspiracy to extort money. The convictions were affirmed on appeal. *United States* v. *Compagna*, 146 F. 2d 524, certiorari denied, 324 U.S. 867.

[5] During 1934, the first year of the computation, petitioner's proved expenditures exceeded his gross funds available by $3,276.10. Since it was possible that petitioner could have accumulated savings of that amount in earlier years, even though not earning enough income to have been required to file tax returns, the Government, rather than arrive at a negative cash on hand position at the end of 1934, treated the $3,276.10 as having been on hand at the beginning of that year (AA. 357–358; GA. 449, 453).

received the following net income during the prosecution years, as compared with the losses reported on his tax returns (AA. 90–106, 528, 533–540):

Year	Reported Net income	Corrected
1948	$18,944.71 (Loss)	$131,616.63
1949	2,282.95 (Loss)	34,002.89
1950	9,838.82 (Loss)	61,915.14

Between 1937 and 1943, petitioner customarily reported on his tax returns unidentified "Miscellaneous Income" or "Other Income" in amounts ranging between $39,000 and $80,000 per year (AA. 109–111, 123–126, 190). He ceased this practice between 1945 and 1947 (when he was serving a prison sentence on his conviction for conspiracy to extort—*supra*, p. 5, and fn. 4; AA. 491) and between 1948 and 1953, when he was on parole (AA. 88, 512). For the years 1954, 1955, and 1956, petitioner again reported large lump-sum amounts of miscellaneous income, now identified as "Personal wagering at tracks, et cetera" (AA. 512–513). During the years of his incarceration petitioner reported only nominal income (AA. 112–113; GA. 449). During those two years, however, he received a number of visits from a notorious reputed racketeer (who came under an assumed name) and another individual, who was in the coin or slot machine business. Petitioner complained to the reputed racketeer about the manner in which his (petitioner's) interests in coin and slot machines were being handled during his incarceration, and was disturbed about the differences of opinion on that subject between his two visitors (AA. 489–492).

The defense adduced no evidence.

ARGUMENT

1. Petitioner's first points (Pet. 2–5) comprise two challenges to the sufficiency of the evidence: (*a*) the solidity of the "starting point" and (*b*) the showing of a "likely source" of unreported taxable income. The contentions are without merit.

(*a*) The expenditures method used to prove the Government's case here is nothing more than a variation of the net worth method. Both have been approved by this Court. *United States* v. *Johnson*, 319 U.S. 503; *Holland* v. *United States*, 348 U.S. 121. Just as in a net worth case the Government establishes the receipt of taxable income by a comparison between the taxpayer's net worth at the beginning and end of the year, and by adding thereto his other non-deductible expenditures, so in a pure expenditures case the receipt of taxable income is proved by a comparison of cash receipts and expenditures, without regard to whether those expenditures have come to rest in tangible assets at the end of the taxable period. In using either method, of course, it is incumbent on the Government to establish a solid starting point for the computations, in order to foreclose the explanation that what appears to be unreported income may simply reflect the use of cash or other assets on hand at the beginning of the taxable year. Such a starting point was amply proved in the case at bar. In making an exhaustive examination of the records of gift and estate tax returns on file, and the records of banks, the

Treasury agents did what they reasonably could to eliminate the likelihood that petitioner might have had cash on hand resulting from gifts, inheritances, or loans. From petitioner's failure to file income tax returns until 1934, the jury could readily infer that his total net income until that time was not in excess of $30,500 (GA. 453), and that the bulk of his earnings must have been used for living expenses between 1920 and 1933. Beginning with the year 1934, the Government reconstructed petitioner's reported net income from his tax returns, adding to those figures additional unreported income, as determined by earlier examinations made by Treasury agents, and non-income funds received by petitioner. After subtracting the total of his proved expenditures between 1934 and 1947, the Government arrived at a difference of $48,697.01, which represented the maximum amount of cash petitioner could possibly have had on hand as of December 31, 1947, the beginning of the prosecution years (*supra*, pp. 5–6). Petitioner chose not to present any witnesses to challenge this figure. Cf. *Holland* v. *United States*, 348 U.S. 121, 138–139. That the Government did not understate his cash on hand is attested to by petitioner's own books, which disclosed that (1) his total undeposited cash on hand at the end of 1939 (including cash in vault, in pocket, and in transit to a stockbroker) was $20,573.21, compared with the Government's figure of $180,891.32 (AA. 182–183; GA. 449); and (2) that his total undeposited cash on hand at the end of 1943 was no more

than $200 compared with the Government's figure of $155,637.53 (AA. 192, 199; GA. 449). Moreover, petitioner on one occasion told a Treasury agent that while he was in the penitentiary (1945 to 1947) it was necessary for his wife to "live off the farm" (AA. 491, 505).

At the beginning of the trial, the defense was concerned as to whether the prosecution would give petitioner credit for some $404,000 in extortion money which the Government, in earlier civil proceedings, claimed he had received between 1935 and 1940 (*supra*, p. 5, and fn. 4; AA. 141; GA. 21–22, 449). Although petitioner concedes that he "never, at any time, claimed that the money he had spent, or accumulated, came from this extortion money" (Pet. 80), he still advances the argument that the Government should have added the entire $404,000 to his reported income, thus making the assumption that none of the extortion proceeds were included in the $177,000 of unidentified "Other Income" and "Miscellaneous Income" reported by petitioner on his tax returns for the years 1937 through 1940 (*supra*, p. 7; AA. 123–126). Petitioner overlooks the evidence which showed that (1) he has denied under oath on no less than five occasions that he ever received *any* of this extortion money; and (2) in the civil tax proceedings the Government took exactly the same position that it took in the criminal case, i.e., that $177,000 of the $404,000 was reported as income, and the other $227,000 was unreported, but petitioner settled the civil tax claims by paying tax on only half of the $227,000 (*supra*, p. 5 and fn. 4). It should be noted, moreover, that even

on petitioner's theory the additional $177,000 with which he claims he should have been credited as of December 31, 1947, would have been entirely absorbed in the $186,847.18 of unreported income proved for the years 1948 and 1949, leaving intact the $61,915.14 of unreported income proved for 1950, the only year which is before this Court (*supra*, pp. 4, 7).

(*b*) The Government established a "likely source" of unreported taxable income by showing that both before his incarceration and after the expiration of his term of parole (1954) petitioner customarily reported as income vast sums identified only as "Miscellaneous Income," "Other Income," or "Personal wagering at tracks, et cetera," and that during his incarceration he retained his interests in coin and slot machines (*supra*, p. 7). From this evidence, as the Court of Appeals held, the "jury could very easily have believed that [petitioner] simply did not report his income from such illicit activities during the period that he was on parole, but did continue to receive such income out of which he made the large expenditures during the years in question" (Pet. 170–171). Moreover, the burden on the Government is not necessarily to prove a "likely source," but to show that the funds in question arose from current taxable income. *Holland* v. *United States*, 348 U.S. 121, 137–138; *United States* v. *Massei*, 355 U.S. 595. In the case at bar, the Government introduced evidence tending to show that the funds could not have arisen from gifts, loans, or inheritances (*supra*, p. 5).

We submit that the evidence to support the jury's verdict of guilty was sufficient.

2. Petitioner contends (Pet. 3–4) that the District Court erred in the admission of hearsay evidence, consisting of (*a*) the Government's estimate of the amount of cash petitioner could have had on hand at the end of 1947, and (*b*) the reports of two internal revenue agents who had examined his returns for years prior to the prosecution years. This argument, which was not raised in either of the courts below, is plainly without substance.

(*a*) As we have shown (*supra*, pp. 5–6), the Government's estimate of the maximum amount of cash which petitioner could have had on hand at the end of 1947 was based upon solid proof, including an exhaustive analysis of petitioner's income tax return filing history, his receipts of non-taxable funds, and his expenditures. The two agents who computed the figure (both expert accountants) testified at length as to their method of doing so, without objection from petitioner (AA. 324, 351–360, 526, 533–534). The summary chart prepared by them, showing their computations in detail, was received in evidence, and copies of it were distributed to the jurors, all without objection by petitioner (AA. 331, 353; GA. 219–220). It is well settled that charts of this kind, when based upon documents themselves competent and accessible, are admissible. *United States* v. *Kelley*, 105 F. 2d 912, 918 (C.A. 2d); *Graves* v. *United States*, 191 F. 2d 579, 584 (C.A. 10th); *Bell* v. *United States*, 185 F. 2d 302 (C.A. 4th), certiorari denied, 340 U.S. 930; *Gendelman* v. *United States*, 191 F. 2d 993, 996–997 (C.A. 9th), certiorari denied, 342 U.S. 909; Cf. *Holland* v. *United States*, 348 U.S. 121, 127–128.

(*b*) The investigation reports of Agents Klein and Ruggaber were introduced into evidence not only without objection by defense counsel, but with his full concurrence (GA. 33, 218).* True, counsel stated that he was suggesting their admission because he believed "that the case has developed to the point that a correct understanding of the record requires those reports to be in" (GA. 33), but it was counsel himself who allowed that development by permitting Klein to testify as to his investigation, without any objection (AA. 166–174), and by permitting Ruggaber to testify on direct examination as to his investigation, without any suggestion that hearsay evidence was involved (AA. 115–125, 258–263). On cross-examination of Ruggaber, defense counsel attempted to bring out that some of the conclusions in his report were based on hearsay (AA. 129–135), but did not move to strike any of his testimony, and later agreed that the report should be received in evidence (GA. 33). Petitioner's present argument, then, goes to the weight of the evidence rather than its admissibility. But it is settled that when hearsay evidence is "admitted without objection it is to be considered and given its natural probative effect as if it were in law admissible." *Diaz* v. *United States*, 223 U.S. 442, 450, and cases cited.

3. Equally without merit is the argument (Pet. 4) that the Court of Appeals' reversal of petitioner's conviction on the first two counts requires reversal on

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*Petitioner's counsel objected initially to the admission of these reports, but later withdrew his objection and they were admitted in evidence (AA. 174, GA. 33, 218).

Count III, because "the same error contributed to the conviction on the third count." The first two counts were reversed not because of any weakness in the Government's expenditures case as such, but because the court found no evidence that petitioner himself had made the false statements attributed to him in those counts (Pet. 164, 167).[7] This finding could not possibly apply to Count III, which charged petitioner with having wilfully attempted to evade and defeat his 1950 income taxes by filing a false and fraudulent tax return. It is undisputed that petitioner signed and filed that return (Cf. Pet. 167).

4. Petitioner urges (Pet. 5–6, 142–146) that he was entitled to the production, for use in cross-examining Agent Thomas N. Smith, of reports written by Smith to his superiors in the Internal Revenue Service in 1952, 1954 and 1955 (AA. 311–313, 649). Petitioner relies upon *Jencks* v. *United States*, 353 U.S. 657 and the so-called Jencks statute, 18 U.S.C. Section 3500. The point is plainly without merit. That case and

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[7] Prosecution of petitioner for the filing of false and fraudulent tax returns in an attempt to evade his 1948 and 1949 taxes was barred by the statute of limitations. The indictment alleged that with respect to those taxes the petitioner's attempts to evade took the form of later "making and causing to be made false statements and representations" before officials of the Treasury Department (AA. 3, 4). Cf. *United States* v. *Beacon Brass Co.*, 344 U.S. 43. The Court of Appeals found that the alleged false statements were not made by petitioner and could not fairly be attributed to him, but were more in the nature of "verbal fencing" (Pet. 164) between petitioner's representatives (in his presence) and representatives of the Internal Revenue Service.

statute relate solely to reports of a Government witness touching upon his testimony on direct examination. Here Smith testified only (save for three questions relating to his occupation) as to a conversation he had with petitioner on February 2, 1956, wherein petitioner stated that he had paid $25,000 into a common defense fund for the purpose of paying attorney's fees in connection with the extortion case (AA. 298–299). On February 28, 1956, and again on March 13, 1957, Smith prepared memoranda relating to this conversation, both of which were turned over to defense counsel (AA. 313–316, 432–439). All of the other reports and memoranda of Agent Smith relating to this case were written prior to 1956 (AA. 311–313). No argument is needed to demonstrate that writings prepared by Smith prior to 1956 could not have been reports "touching the events and activities as to which [he] testified at the trial." *Jencks* v. *United States,* 353 U.S. at 668.

5. Petitioner contends (Pet. 6) that the verdict of guilty on Count III is inconsistent with the verdict of not guilty on Count IV, the conspiracy count.[3] The short answers to this argument are that (1) there is no requirement that a jury's verdict be consistent (*Dunn* v. *United States,* 284 U.S. 390); and (2) a "conspiracy to commit a crime is a different offense from the crime that is the object

[3] The Court of Appeals stated: "* * * counsel for De Lucia conceded in oral argument in this Court, and correctly so, that there is no inconsistency between the verdicts of not guilty on Count IV and of guilty on Count III" (Pet. 172).

of the conspiracy."* (*American Tobacco Co.* v. *United States,* 328 U.S. 781, 789 and cases cited.)

6. Petitioner's final contention (Pet. 7) is that the District Court erred in giving a supplemental instruction to the jury. The jury deliberated for approximately ten hours on the day the case was submitted (AA. 603, 630–631). At 10 o'clock the next morning the court gave a supplemental charge urging the jury to reach a verdict if they could conscientiously do so (AA. 632, 637–639), and the verdict came in mid-afternoon of that day (AA. 641–642). There was no objection to the giving of a supplemental charge though petitioner did dispute some of the language employed (AA. 632–637). We submit that the charge, which was based upon that given in *Allen* v. *United States,* 164 U.S. 492, 501, was correct. See also *United States* v. *Furlong,* 194 F. 2d 1 (C.A. 7th), certiorari denied, 343 U.S. 950.

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*This is true *a fortiori* in the instant case, where Count III alleges that petitioner wilfully attempted to evade his 1950 income taxes by filing a false and fraudulent return, and Count IV alleges that he and one Bulger conspired to "knowingly and wilfully make false, fictitious, and fraudulent statements and representations in a matter within the jurisdiction of * * * the * * * Internal Revenue Service, in violation of Sections 2 and 1001, Title 18 * * *" (AA. 5–6).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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